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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CARMEN POWELL, Plaintiff, v. CITY OF CHULA VISTA; CHULA VISTA POLICE DEPARTMENT; DET. RUTH HINZMAN; AGT. ANDERSON; AGT. OYOS; SGT. CERVANTES; AND PERSON ENTITIES UNKNOWN; COUNTY OF SAN DIEGO AND SAN DIEGO COUNTY PROTECTIVE SERVICES WORKERS JULIE SMITH, NADIA NAJORS, MEGAN PETFINGER, REBECCA SLADE, SOFIA SANCHEZ, LIZA GARCIA, DOES 1 to 100, Defendants.	No. 07-cv-1836-JAH(JMA) **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** Date: August 18, 2008 Time: 2:30 p.m. Dept.: 11 - Courtroom of the Honorable John A. Houston Trial Date: None

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Plaintiff argues that the Rooker-Feldman doctrine is not a bar to her lawsuit and she should be allowed to proceed with her lawsuit because defendants conspired about the matters on which the Superior Court later issued dependency orders before there was any judicial involvement; and because her lawsuit is for injuries resulting from her arrest, and the underlying removal of her children and not for alleged injuries flowing from the Superior Court's dependency orders.

First, as concerns Powell's false arrest claim, it is not alleged against defendant Smith. Rather, it is directed against Chula Vista Police Department personnel who have not appeared in this action. Since there is no allegation that defendant Smith was involved in the arrest, and because there is no vicarious liability under section 1983 jurisprudence, no false arrest claim is stated against defendant Smith. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Palmer v. Sanderson*, 9 F.3d 1433, 1437-1438 (9th Cir. 1993). The false arrest claim must be dismissed as to defendant Smith.

In her opposition, plaintiff tries to salvage the balance of her lawsuit from the Rooker-Feldman jurisdictional bar by arguing she is not challenging the Superior Court's dependency orders that authorized removal of the children, but that she is suing for injuries caused by the underlying removal of her children. As will be demonstrated below by a review of plaintiff's contentions and case authorities, her argument is illogical because it is that very removal that the dependency orders pertain to. If the removal was authorized by the dependency orders, then there can be no basis for any damage claim. To obtain damages, plaintiff would need to prove that the dependency orders were errant and that proof is what is barred by the Rooker-Feldman doctrine. Additionally, if plaintiff's argument were taken at face value, that is that she is suing for the underlying removal of the children from the family home, then plaintiff has just argued herself out of a case against defendant Smith because Smith did not and is not alleged to have removed the children from the family home in the first instance.

Plaintiff attempts to convince the Court that her lawsuit is not a challenge to the Superior Court dependency orders, by saying her federal lawsuit was filed before the Superior Court issued any dependency order pertaining to her children. But she is contradicted by her own pleadings. Plaintiff's original complaint was filed on September 19, 2007. Almost a year before, on August 22, 2006, the Superior Court Juvenile Division issued its first dependency order pertaining to plaintiff and her children. And some seven months before plaintiff filed her federal lawsuit, the

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Superior Court issued the dependency order to which plaintiff with her attorney stipulated on February 1, 2007.

Citing *Nesses v. Shepard*, 68 F.3d 1003 (7th Cir. 1995), plaintiff also argues that she should be allowed to proceed with her federal action because she sues defendant Smith and others for corrupting the state judicial process. *Nesses* does not assist plaintiff in salvaging her action as against the bar of the Rooker-Feldman doctrine, res judicata, or collateral estoppel. Nesses sued lawyers and judges who were involved in his state court contract case alleging they engaged in a massive conspiracy to engineer his defeat in state court contract action. The federal district court dismissed his lawsuit for want of jurisdiction under the Rooker-Feldman doctrine. On appeal the judgment was affirmed on res judicata grounds. Speaking to the Rooker-Feldman doctrine, the appellate court observed that Nesses could not show injury from the alleged conspiracy unless the decision dismissing his suit for breach of contract was shown to be erroneous and that endeavor would be barred by the Rooker-Feldman doctrine. *Nesses v. Shepard*, 68 F.3d at 1005. But even supposing that Nesses were alleging some kind of a claim against the lawyers and judges for allegedly corrupting the state judicial process that was independent of the state court's disposition of his contract case, Nesses could not pursue such a claim unless he could first establish that the allegedly tainted state court judgment had been set aside or reversed and that the state court action terminated in his favor. *Id.* Plaintiff may say she is suing for an alleged corruption of the state dependency judicial process, but she cannot sue therefore because she cannot plead or prove that dependency proceedings terminated in her favor, that is that the dependency orders have been set aside or reversed on appeal.

Plaintiff also argues that her lawsuit should not barred because she allegedly did not have any reasonable opportunity to raise her contention that false evidence was being used against her in the Superior Court dependency proceedings. In support of this argument, plaintiff relies on *Long v. Shorebank Dev. Corp.*, 182 F.3d 548 (7th Cir. 1999). *Long* is distinguishable and inapposite to plaintiff's case. In *Long*, Shorebank brought an unlawful detainer action in Illinois state court against tenant Long based on past due rent. Long acted in propria persona and maintained she was not in arrears. Just prior to a hearing on the matter, the landlord's attorney induced Long to sign a stipulated eviction judgment by telling her that the document was only a stipulation to continue the hearing date and that she could use the continuance to resolve her dispute with the landlord. Afterwards, without giving notice to Long, the landlord's attorney made an ex parte court appearance, told the court that Long did not dispute the landlord's claims, and had judgment entered against the tenant. Long then sued in federal court alleging violation of the federal Fair Debt Collections Practices Act and for deprivation of due process under § 1983. Finding that the Rooker-Feldman doctrine does not bar federal lawsuits by claimants who had no realistic opportunity in state court to raise the grounds on which they premise their federal claims, Long was allowed to proceed with her federal lawsuit not because her opponent's chicanery kept her out of court, but rather because Illinois state law precluded her from raising her due process and Fair Debt Collection Practices Act violations concerns in the unlawful detainer action. *Long v. Shorebank Dev. Corp*., 182 F.3d at 559. Unlike in *Long*, there is no similar restriction under California law that prohibited plaintiff and her attorneys in the Superior Court dependency proceedings from raising any of the issues she now seeks to litigate in this action. To the contrary, plaintiff actually did raise her contentions in Superior Court. (Lgmt. 261- 297.) Plaintiff cannot circumvent the Rooker-Feldman bar.

Citing to *Ernst v. Child & Youth Servs*., 108 F.3d 486, 492 n.4 (3rd Cir. 1997), plaintiff also argues that the Rooker-Feldman doctrine does not bar her from suing to

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prove that the dependency judgment that was entered by stipulation on February 1, 2007, was obtained in bad faith.[1] *Ernst* is not authority for plaintiff's proposition. And *Ernst* is distinguishable and detrimental to plaintiff's claim.

Ernst was the grandmother and sole guardian of her granddaughter who was removed from Ernst's care pursuant to a dependency petition and stipulated dependency adjudication order. As administration of the dependency case progressed, Ernst's relationship with the Children & Youth Services ("CYS") agency of Chester County, Pennsylvania, deteriorated. And instead of reunification, CYS pursued permanent foster family placement for the granddaughter. Ernst regained custody of her granddaughter. Ernst sued the CYS and its personnel alleging they violated her procedural due process rights, and violated her substantive due process rights by making dependency recommendations to the state court out of malice and personal bias. *Ernst*, 108 F.3d at 492. On appeal defendants prevailed. Defendants were accorded absolute immunity for the recommendations they made to the court and for advocating the CYS case. Also, the CYS defendants raised the Rooker-Feldman doctrine as a defense. The *Ernst* court felt the Rooker-Feldman doctrine did not deprive it of jurisdiction to adjudicate Ernst's claim first because the state court in the dependency proceeding did not address Ernst's claim of malice and bias and thus that claim could not be said to have been "inextricably intertwined with the state court's decision"; second, because in the *Ernst* court's estimation addressing Ernst's claim would not require the court to find that the state court dependency judgment that issued in reliance on the recommendations was erroneous; and third, because Ernst's request for money damages was not the equivalent of an appeal on the state court judgment. *Ernst*, 108 F.3d at 492. *Ernst* is distinguishable and contrary to Ninth Circuit authority.

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[1] Under California Welfare and Institutions Code section 388, and California Code of Civil Procedure section 473, plaintiff had ample process to move to alter, revise and to seek relief from court orders and judgments due to changed circumstances, mistake surprise etc.

The fulcrum of Powell's claim against defendant Smith is that defendant Smith proffered false evidence during the Juvenile Court dependency proceedings.[2] Unlike in *Ernst*, plaintiff's contentions regarding the grounds for her children's' removal and the credibility of the social workers involved in the case were litigated in the Superior Court dependency proceedings with findings issuing thereon. Lgmt. p. 21:24-28; Lgmt. p. 026; Lgmt. p. 028; Lgmt. p. 30; Lgmt. pp. 50-55, 58:18 - 59; Lgmt. pp. 68-75; Lgmt. pp. 85-87; Lgmt. 261- 297; Lgmt. 298- 302; Lgmt. 303-308.

"The Rooker-Feldman doctrine precludes district courts from considering constitutional claims that are "inextricably intertwined" with the state court's rulings. *Id.* [*Worldwide Church of God v. McNair*, 805 F.2d 888 (9th Cir. 1986)] at 891. A federal claim is considered "inextricably intertwined" with a state court judgment 'if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.' *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987)." *Gimbel v. State of California*, 2008 U.S. Dist. LEXIS 28201, *4. Plaintiff's lawsuit is barred because the factual basis for her claim against defendant Smith was litigated and is therefore inextricably intertwined with the juvenile court's decisions involving plaintiff and her children.

Also, Ernst was allowed to proceed with her challenge to the subjective motivations of persons who prosecuted the state dependency action because the *Ernst* court concluded that a ruling on that issue would not undermine the integrity of the state court's dependency order, and because it did not perceived Ernst's request for monetary damages as a challenge to the dependency order. That conclusion was anomalous and inconsistent with Ninth Circuit authority. In *Kelley v. Kahan*, 2006 U.S. Dist. LEXIS 36595, Kelley, much like plaintiff here, alleged that the procedures and substantive outcomes in his state action were manifestations of a conspiracy to deprive him of his civil rights. A domestic violence protection order precluded Kelley

[2] As explained in defendant's moving papers, defendant Smith has absolute immunity for any claim for presenting evidence in a court hearing.

from contacting his daughter, and required him to attend parenting classes, and undergo a psychological evaluation. The court found Kelly's federal action was "the functional equivalent of an appeal of the state court decision," and therefore barred. The court explained, "Kelley complains of a conspiracy that deprived him of his ability to interact with his daughter and, perhaps, of his due process rights. The same harm that he identifies as the outcome of the conspiracy is that which was the result of the state court proceedings. . . Kelley cannot seek a remedy in federal court for a harm imposed by a state court decision. It is irrelevant that Kelley does not specifically seek reversal of the state court's decision, but rather only asks 'for any and all damages allowed by law in an amount to be proved at trial' and '[f]or such other relief as the Court may deem to be just, proper, and equitable.' Complaint ¶¶ 53, 58. This distinction lacks salience because in order to establish the predicate injury to his claim, 'the plaintiff would have to show that the violation of such an independent right caused an erroneous adverse decision to be made and this is precluded by the Rooker-Feldman doctrine.' [citation omitted]." *Kelley*, 2006 U.S. Dist. LEXIS 36595, *12. Citing to *Bianchi v. Rylaarsdam*, 334 F.3d 895, 896 (9th Cir. 2003), the court in *Kelly* decided that the court lacks subject matter jurisdiction when "to entertain his challenge and grant relief would necessarily require us to review and invalidate the state court decision." *Kelley v. Kahan*, 2006 U.S. Dist. LEXIS 36595, *9. The focus is thus on the federal claim's relationship to the issues involved in the state court proceeding, instead of on the type of relief sought by the plaintiff.

Plaintiff's federal lawsuit here is barred for the same basic reasons Kelly's action was barred. The injury she alleges to have incurred by reason of the removal of her children is the same injury imposed on her by the Superior Court's dependency orders. For her to succeed in this action she would have to show that the Superior Court's findings in connection with its orders were erroneous. Powell says in her opposition that she is not seeking by this lawsuit to overturn the Superior Court's dependency orders, but rather seeks redress for injuries incurred by virtue of the removal of her children. But that removal has already been adjudicated in Superior Court. If the removal was for cause, there is no injury for which compensation can be due. As stated in defendant's moving papers because she is but seeking to relitigate issues already adjudicated by the Superior Court, her federal action is barred.

Based on the foregoing and defendant's moving papers, plaintiff's amended complaint should be dismissed with prejudice because it is barred by the Rooker-Feldman Doctrine, the full faith and credit clause, res judicata, collateral estoppel, because Julie Smith is absolutely immune for her conduct as a witness providing evidence in the juvenile court proceedings, and because the state court holds exclusive jurisdiction over plaintiff's claims to custody of her children.

DATED: August 8, 2008

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

[Carmen Powell v. City of Chula Vista, et al.; USDC No. 07-cv-1836-JAH(JMA)]

I, ROSANNA LONERO declare that: I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I served the following document(s): **Reply Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff's First Amended Complaint** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

Carmen Powell
372 Bay Leaf Drive
Chula Vista, California 91910

Plaintiff in Pro Per

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 8, 2008 at San Diego, California.

Rosanna Lonero

ROSANNA LONERO